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STATEMENT AS TO JURISDICTION

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954.

No. 460

FREEDA CAROLINE MILLER, also known as FREEDA MILLER, APPELLANT,

v.

PUBLIC SERVICE COMPANY OF COLORADO, a corporation; THE DISTRICT COURT OF ADAMS COUNTY, and CHRISTIAN D. STONER, one of the Judges thereof, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

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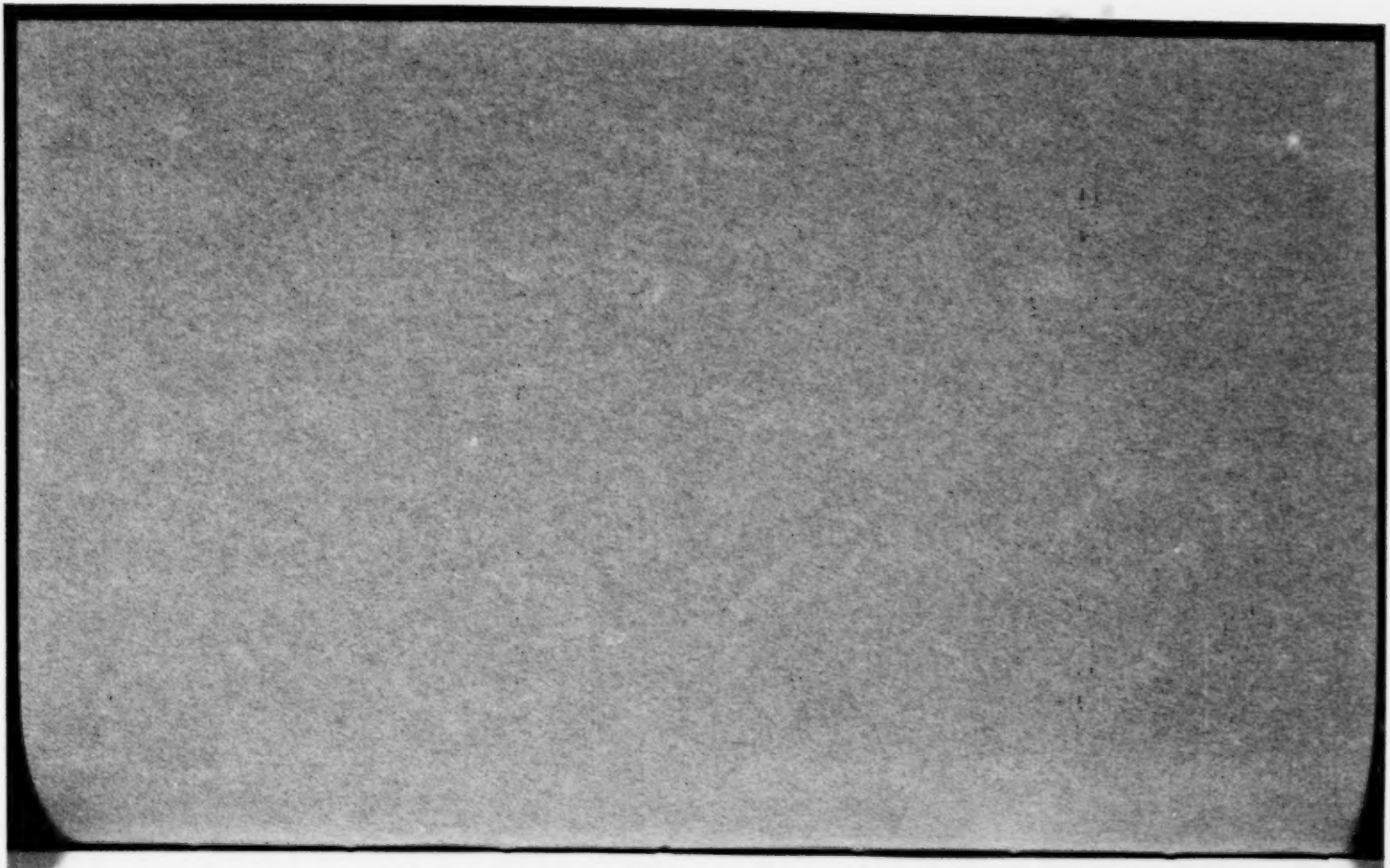

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954.

No. .....

FREEDA CAROLINE MILLER, also known as FREEDA MILLER, APPELLANT,

v.

PUBLIC SERVICE COMPANY OF COLORADO, a corporation; THE DISTRICT COURT OF ADAMS COUNTY, and CHRISTIAN D. STONER, one of the Judges thereof, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

STATEMENT AS TO JURISDICTION.

Pursuant to the provisions of Rules 13 and 15 of the Supreme Court of the United States, the above named appellant files this, her jurisdictional statement:

DECISION APPEALED FROM.

(a) The decision of the Colorado Supreme Court which is appealed from is reported as *Miller v. Public Service Company of Colorado, et al*, 272 Pac.(2d) 283. It has not yet been reported in the official reports. A copy of the opinion of the court is attached hereto as Appendix A.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED.

(b) Jurisdiction of the United States Supreme Court is invoked on the following grounds:

Nature of Proceedings.

(i) This proceeding was instituted in the Supreme Court of Colorado to obtain a Writ of Prohibition* directed to the District Court of the State of Colorado in and for the County of Adams to restrain that court from proceeding in an action instituted by the appellee Public Service Company of Colorado to condemn real property owned by the appellant. The said action in eminent domain was brought pursuant to section 52, Chapter 61, 1935 Colorado Statutes Annotated, as amended by Chapter 41, 1952 Session Laws of Colorado.

Date of Judgment.

(ii) The judgment sought to be reviewed was rendered on June 14, 1954, and became final and was entered on July 19, 1954, a copy of which is attached hereto as Appendix B and C.

---

*The Colorado Rules of Civil Procedure do not provide for the issuance of a Writ of Prohibition as such. Rule 106 of the Colorado Rules of Civil Procedure provides as follows:

"Special forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and proceedings for the issuance of other remedial writs, as heretofore known, are hereby abolished. In the following cases relief may be obtained by appropriate action or by an appropriate motion under the practice prescribed in these rules:

"(4) Where an inferior tribunal (whether court, board, commission or officer) exercising judicial or quasi-judicial functions, has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy. Upon the filing of the complaint the court shall direct the issuance of a citation to the inferior tribunal to show cause why the relief requested shall not be allowed. If the complaint is supported by an affidavit the order to show cause may be issued, or the court may forthwith order the inferior tribunal, or any person having custody of the records of the proceedings described in the complaint, to certify to the court at a specified time and place a transcript of the records and proceedings, or such portion thereof as the court may direct. If a stay of proceedings is granted the citation or order shall so state. Review shall not be extended further than to determine whether the inferior tribunal has exceeded its jurisdiction or abused its discretion."

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Statutory Provision Conferring Jurisdiction to Entertain This Appeal.

(iii) The statutory provision believed to sustain the appellate jurisdiction of this Court is Title 28, United States Code, Sec. 1257 (2) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Cases Sustaining Jurisdiction of This Court.

(iv) Cases believed to sustain the jurisdiction of this Court to entertain this appeal are: *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507; *Rescue Army v. Municipal Court of the City of Los Angeles*, 331 U.S. 549, 585, 67 S.Ct. 1409, 91 L.Ed. 1666; *Dandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 52 S.Ct. 103, 76 L.Ed. 136; *Michigan Central Co. v. Mix*, 278 U.S. 492, 49 S.Ct. 207, 73 L.Ed. 470; *Madruga v. Superior Court*, 346 U.S. 556, 74 S.Ct. 298; *Hammerstein v. Superior Court*, 341 U.S. 491, 71 S.Ct. 820, 95 L.Ed. 1135.

Text of Statute Which Is Challenged.

(v) The text of the statute, the validity of which is challenged, is as follows:

> "Section 1. Section 52, Chapter 61, 1935 Colorado Statutes Annotated, is hereby amended to read as follows:
>
> "Section 52. *Companies That May Condemn Real Estate, Rights of Way, Easements or Other Rights.* If any corporation formed for the purpose

of constructing a road, ditch, reservoir, pipe line, bridge, ferry, tunnel, telegraph line, railroad line, electric line or electric plants, shall be unable to agree with the owner, for the purchase of any real estate or right of way or easement or other right necessary or required for the purpose of any such corporation, for transacting its business, or for any lawful purpose connected with the operations of the company, such corporation may acquire title to such real estate or right of way, or easement or other right, in the manner provided by law for the condemnation of real estate, or right of way; and any ditch, reservoir, or pipe line company may, in the same manner, condemn and acquire the right to take and use any water not previously appropriated.

"Section 2. This Act shall be in force and effect after December 15, 1952." (Ch. 41, 1952 Session Laws of Colorado).

QUESTIONS PRESENTED BY THIS APPEAL.

(c) The questions presented by this appeal are:

1. Whether Section 52, Chapter 61, 1935 Colorado Statutes Annotated as amended by 1952 Session Laws which grants to corporate public utilities the right to condemn private property but denying such right to a non-corporate public utility, is repugnant to the 14th Amendment of the Constitution of the United States, in that it constitutes a denial of the equal protection of the laws.

2. Whether Section 52, Chapter 61, 1935 Colorado Statutes Annotated as amended by 1952 Session Laws which grants the right to corporate public utilities to condemn private property is repugnant to the 14th Amendment to the Constitution of the United States, in that it permits private corporations to condemn property for private use in violation of the due process of law clause of the 14th Amendment.

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STATEMENT OF THE CASE.

(d) The appellee Public Service Company of Colorado is a private Colorado corporation engaged in the production and sale of gas and electricity for profit in the State of Colorado.

The appellant is the owner of a dairy farm located in Adams County, Colorado, consisting of 91.53 acres of land in said county.

Appellee Public Service Company of Colorado brought an action in the Colorado District Court in and for the County of Adams to condemn appellant's said real property for the alleged purpose of constructing an electric generating plant on said land.

The said appellee has not obtained any certificate of necessity from the Colorado Public Utilities Commission as required by Colorado law (sec. 36, ch. 137, 1935 Colorado Statutes Annotated).

After the commencement of the said action in the District Court, appellant filed an original proceeding in the Supreme Court of Colorado in the nature of prohibition, seeking a writ to prohibit and restrain the said District Court from proceeding in the said condemnation action on the grounds, *inter alia* that the statute relied upon by the said appellee was repugnant to the 14th Amendment to the Constitution of the United States in that it denies to persons within the jurisdiction of the State of Colorado the equal protection of the laws, contrary to the provisions of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States and for the further reason that, the said statute permits the appellee Public Service Company of Colorado to condemn property for a private use and purpose, and thereby deprives appellant of her property without due process of law, contrary to the provisions of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States.

On the 22nd day of April, 1954, the Supreme Court of Colorado issued a rule to show cause why the proceeding in the District Court should not be prohibited.

After the parties had filed briefs, and the Court had taken the matter under consideration, the Supreme Court of Colorado discharged the rule to show cause, and denied appellant's prayer for a writ of prohibition, which decision and judgment is the subject of this appeal.

Manner in Which Federal Questions Were Raised in State Court.

The constitutional questions presented were raised by appellant in the Supreme Court of Colorado by Paragraph A(c) of the Specification of Points contained in her complaint filed in the Supreme Court of Colorado.

The Colorado Supreme Court passed upon the constitutional issues presented in its decision denying appellant's prayer for a writ of prohibition (272 Pac. (2) 283):

See pages 12-14 of the Appendix A attached hereto.

GROUNDS FOR CONTENDING FEDERAL QUESTIONS ARE SUBSTANTIAL.

(c) The federal questions presented by this appeal are substantial, in that:

1. The decision and judgment of the Colorado Supreme Court discharging its rule to show cause, and denying the relief prayed for by appellant, constituted a final judgment of the highest court of the State of Colorado upholding the validity of a statute of the State of Colorado as against appellant's claim of its invalidity on the ground of being repugnant to the Constitution of the United States.

2. The equal protection clause of the Fourteenth Amendment to the Constitution of the United States requires equality of privileges, rights and advantages to all

persons within the jurisdiction of the state. *State of Missouri, ex rel Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232.

3. The equal protection of the laws is a basic constitutional right and the denial thereof by a state legislature raises a substantial federal issue. *Pierre v. State of Louisiana*, 306 U.S. 354, 59 S.Ct. 536.

4. Expropriation of private property for a private use constitutes a taking of property without due process of law, contrary to the Fourteenth Amendment, and the determination of whether the proposed use is public or private is a judicial question. *City of Cincinnati v. Vester*, 281 U.S. 439, 50 S. Ct. 360.

5. This Court held in *Milheim v. Moffat Tunnel Improvement District*, 262 U.S. 710, 43 S.Ct. 694, that: "The nature of a use, whether public or private, is ultimately a judicial question" (262 U.S. 717), and that "The federal question presented, being one which requires analysis and exposition for its decision is not frivolous, and the motion to dismiss the Writ of Error is accordingly denied" (262 U.S. 716, 717).

Respectfully submitted,

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APPENDIX A

FREEDA CAROLINE MILLER, also known as FREEDA MILLER, Complainant, v. PUBLIC SERVICE COMPANY OF COLORADO, a Corporation; THE DISTRICT COURT OF ADAMS COUNTY; and CHRISTIAN D. STONER, one of the Judges thereof, Respondents.	No. 17426. June 14, 1954. ORIGINAL PROCEEDING. EN BANC. RULE TO SHOW CAUSE DISCHARGED.

Messrs. Jacob L. Sherman, Harry A. Feder, Milton Morris, Attorneys for Complainant.

Messrs. Lee, Bryans, Kelly and Stansfield, Fred M. Winner, William W. Gaunt, Attorneys for Respondents.

Mr. Justice Holland delivered the opinion of the Court.

The principal question here presented is that of the right of the Public Service Company of Colorado, a utility corporation, to proceed under the Eminent Domain Statute, as amended.

December 14, 1953, the utility company filed its petition in eminent domain in the District Court of Adams county, seeking to condemn 91.53 acres of land situated at 62nd and York streets in Adams county for the purpose of constructing a new electric generating plant in order to meet the present and future requirements for service of electric power to its customers. It further is alleged in the petition that the premises are presently devoted to agricultural purposes and not to any public use and that the company had been unable to reach an agreement with

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the property owner, herein called respondent, with respect to compensation for the property; and further that it was proceeding under the authority of section 52, chapter 61, '35 C.S.A., as amended in 1952, effective after December 15, 1952. The respondent property owner filed five motions to this petition, namely, motion to determine necessity, motion for judicial ascertainment of public use, request for jury trial, motion to dismiss and an additional motion to dismiss.

The motion to determine necessity was for the appointment of a commission to determine such necessity. The motion for judicial ascertainment for a public use was to the effect that the court make a judicial ascertainment as to the public use of the land described in the petition; the two motions to dismiss were on the grounds that the petition did not state a claim upon which relief could be granted; that the sections of the statutes, supra, relied upon, are unconstitutional; and finally, that the district court was without jurisdiction over the person and the subject matter of the action.

The two motions to dismiss were argued and denied and on the motion for judicial ascertainment for public use the court made a finding that the property sought to be condemned was for a public use.

Respondent, having obtained a stay of execution in all proceedings, filed her complaint in our Court under Rule 106, R.C.P. Colo., for a review of the orders of the trial court, and for an order against the trial court and petitioner to show cause why the relief requested in the petition should not be allowed. Our Court on April 22, 1954, issued its rule to show cause and entered a stay of execution. Answer and return having been filed, the matter is at issue and petitioner presents the following contentions as reasons for reversal or to make the rule absolute, namely:

1. That it is not alleged in the petition that the util-

ity company had a certificate of necessity and permission from the Public Utilities Commission to construct a new electric generating plant.

2. That there is no allegation that the proposed plant and location had been approved by the Planning Commission of Adams County.

3. That sec. 52, c. 61, '35 C.S.A., as amended, is unconstitutional because of class legislation and is contrary to Article V, sec. 25 of the Colorado Constitution and of the Fourteenth Amendment to the federal Constitution, and as amended violates Article II, section 14 of the Colorado State Constitution.

4. That the land sought to be condemned is now devoted to public use and cannot be taken for another public use without showing greater need or necessity.

It further is contended by respondent, now petitioner in the present proceedings, that the obtaining of a certificate of necessity from the Public Utilities Commission is a prerequisite to a condemnation proceeding as well as the obtaining of permission for construction and location by the proper authority of Adams county.

From our study and consideration of the contentions of petitioner, respondent below, it appears that such are in conflict with the well-settled law of eminent domain in this state.

On the question of its being necessary to first obtain a certificate of public convenience and necessity before seeking condemnation, the statute apparently relied upon, section 36, chapter 137, '35 C.S.A., does not contain such requirement. The pertinent part of the statute is, "No public utility shall henceforth begin the *construction of a new facility*, plant or system, or of any extension of its facility, plant or system, without first having obtained from the commission a certificate * * *." (Emphasis supplied.) Thus it appears that such certificate is not necessary for

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the purpose of condemnation and relates solely to the question of use after the property has been acquired by condemnation. It is difficult to conceive how the utility could logically proceed in obtaining the certificate of convenience and necessity as to the particular land or property involved before it had acquired the right to use the land or obtained title thereto by condemnation. The so-called certificate is only a permit or license to use and enjoy land that has been condemned; it is not a condition precedent to the right to condemn; and has no relationship whatever with the matter of condemnation. This being true, such an allegation of which complaint is made here, is not necessary.

In the matter of the necessity of the approval of the Planning Commission of Adams county, the jurisdiction of Colorado courts over eminent domain proceedings is not affected by the lack of such an allegation in the petition for condemnation that such approval has been obtained, and it is not necessary as a condition precedent to eminent domain. However, in this instance, it is shown by respondent-petitioner's own witness, Building Inspector of Adams county, testifying at the arguments of the motions to dismiss, that the property here involved is already zoned for industrial purposes and, upon identification of the zoning resolutions, the same were admitted in evidence which show a resolution providing that Industrial One District permits the following use, "light or power plant, central station". Therefore, where the contemplated use falls within a zone already established, there would be no need for obtaining the approval of the Planning Commission if such was at all necessary. It is obvious that it would be impossible for the utility to submit to such Planning Commission the extent and exact location of the property involved, which it might never be able to obtain, and at least it would be premature; moreover, the extent and exact location as referred to in the statute, section 9, chapter 45A, '35 C.S.A., could not be determined in emi-

nent domain proceedings until the question of necessity has been decided.

Respondent-petitioner, an individual property owner, has not shown herself to be one of a class affected by her claim that the statute under which the utility is now proceeding to condemn her property is class legislation. If the statute here questioned as being unconstitutional can be said to be class legislation, it is because all businesses specified in the statute are not equally protected. The statute specifies who may condemn private property and respondent-petitioner does not fall within the class of persons so specified. The amended statute, section 1, chapter 41, S.L. '52, here involved and under which the utility is proceeding and which became effective December 15, 1952, is as follows:

> "If any corporation formed for the purpose of constructing a road, ditch, reservoir, pipe line, bridge, ferry, tunnel, telegraph line, railroad line, electric line or electric plants, shall be unable to agree with the owner, for the purchase of any real estate or right of way or easement or other right necessary or required for the purpose of any such corporation, for transacting its business, or for any lawful purpose connected with the operations of the company, such corporation may acquire title to such real estate or right of way, or easement or other right, in the manner provided by law for the condemnation of real estate, or right of way; and any ditch, reservoir, or pipe line company may, in the same manner, condemn and acquire the right to take and use any water not previously appropriated."

It is abundantly clear that the above section of the statute provides that a corporation, such as the petitioner here, may institute condemnation proceedings for the construction of an electric plant as here involved. Prior to the effective date of this amendment, December 15,

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1952, no such authority existed under the old statute and this was fully determined in the case of *Potashnik v. Public Service Company of Colorado*, 126 Colo. 98, 247 P. (2d) 137, decided July 14, 1952. If respondent, now complainant, could approvingly be heard on her contentions that the Act, as amended, is uncontitutional as being class legislation, it is well to note that she apparently has overlooked the fact that the language of the Act, upon which she bases her contention, has remained the same for many years and has been upheld by this Court on several occasions, one of the latest being *Pine Martin Mining Co. v. Empire Zinc Co.*, 90 Colo. 529, 11 P. (2d) 221. It is herein contended that because the statute gives corporations engaged in certain kinds of business the right to condemn, while an individual so engaged is denied that right, therefore he is deprived of equal protection of the law and results in class legislation. This classification was not added to the eminent domain statutes by this recently amended section. The section expressly designates the type of corporation that may avail itself of the right to condemn and such right is strictly confined to certain enumerated corporations. Only such corporations or individuals as might be adversely affected, are entitled to assail the constitutionality of such a statute. *Rinn v. Bedford*, 102 Colo. 475, 84 P. (2d) 827.

We believe the question of the constitutionality of this statute, as it may or may not relate to individuals, is clearly settled by the language of Mr. Justice Clark in the case of *Potashnik v. Public Service Co. of Colorado, supra*, as follows:

> "Statutes granting to certain types of corporations, of which the Company is one, the right to exercise the powers of eminent domain, and charter provisions of such corporations to enable them to take advantage of this privilege, grant no power in

addition to that accorded by the specific provisions of the general law covering that subject, and are designed only to give to those particular corporations the same rights under the eminent-domain provisions as might be exercised by an individual under the same circumstances."

Throughout our entire eminent domain statutes we find the classification of corporations and individuals. If such classification is reasonable and operates with the same effect upon all members of the class involved, then it is within the power of the legislature to make such classification. We find no denial of the right of individuals that may engage in the utility business to equal protection of the law.

The question raised as to whether the contemplated use to be made of the property involved, was a public use, could not be raised by the motion to dismiss. In the condemnation petition it was specifically alleged that the use was public, and respondents in the motion to dismiss, admitted this well pleaded fact; it is, therefore, not properly before us in this proceeding and can only properly be presented here by way of an answer. In fact, the use of the property here contemplated, cannot be said to be other than a public use since the operation of the plant in the furtherance of the conduct of the utility business is for service to the public, and is a business conducted for a public purpose. Complainant contends that the land is already devoted to a public use, because the City of Denver has rights of way for water ditches across the property and, therefore, that portion of the land is devoted to a public use. The City of Denver is not a party to this action and if such right of way does exist, Denver's right would not be affected by this action because it is not made a party. Respondent here is in no position to complain that others who might have an interest in the property are not made parties, because she alone is affected by the outcome of this action, and not

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others she claims may have an interest, and the omission of any party will not invalidate the proceedings as against her.

It being abundantly clear that the amended statute does not offend against either the state or federal Constitution, and that it specifically authorizes a corporation, such as is here involved, to proceed in condemnation of land for the purposes indicated by its pleading, and that respondent's objections to the proceeding are without legal foundation and are contrary to the law and decisions of this Court, the rule to show cause herein must be, and is, discharged in order that the proceedings as instituted in the trial court may go forward.

APPENDIX B.

That thereupon and on the aforesaid fourteenth day of June, A. D. 1954, the following judgment and order discharging rule to show cause was made and entered, to-wit:

Original Proceeding.

No. 17426.

Freeda Caroline Miller, also known as Freeda Miller, COMPLAINANT.

vs.

Public Service Company of Colorado, a corporation; The District Court of Adams County; and Christian D. Stoner, RESPONDENTS.

Upon consideration of the Rule to Show Cause heretofore issued, as well as the answer and reply thereto, the

Court being sufficiently advised, doth, in a written opinion, order that the Rule to Show Cause heretofore issued herein be, and the same hereby is, discharged, set aside and held for naught.

APPENDIX C.

That thereafter, and on, to-wit: the nineteenth day of July, A. D. 1954, the court denied rehearing in said cause; that the order denying rehearing is in words and figures as follows, to-wit:

Original Proceeding.

No. 17426.

Freeda Caroline Miller, also known as Freeda Miller, COMPLAINANT.

VS.

Public Service Company of Colorado, a corporation; The District Court of Adams County; and Christian D. Stoner, RESPONDENTS.

Upon consideration of the motion of the complainant for a rehearing in this cause, the Court being sufficiently advised in the premises, doth this day order that said motion be, and the same hereby is, denied.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954.

No. 321.

FREEDA CAROLINE MILLER, also known as FREEDA MILLER, Appellant,

v.

PUBLIC SERVICE COMPANY OF COLORADO, a corporation; THE DISTRICT COURT OF ADAMS COUNTY, and CHRISTIAN D. STONER, one of the Judges thereof, Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954.

No. 460.

FREEDA CAROLINE MILLER, also known as FREEDA MILLER, APPELLANT,

v.

PUBLIC SERVICE COMPANY OF COLORADO, a corporation; THE DISTRICT COURT OF ADAMS COUNTY, and CHRISTIAN D. STONER, one of the Judges thereof, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF OPPOSING MOTION TO DISMISS

COMES NOW the Appellant, and files her brief opposing the Appellee's Motion to Dismiss:

I.

THE JUDGMENT OF THE COLORADO SUPREME COURT DISCHARGING ITS RULE TO SHOW CAUSE WAS A FINAL DECISION.

The argument of the Appellee on this point is based upon the fact that the procedure in the Colorado Su-

preme Court was termed an "Action In The Nature Of Prohibition" rather than an "Action For A Writ Of Prohibition."

The contention of Appellee in this regard must be considered as frivolous. It is the nature of the procedure in the State Court which determines the appealability of a judgment, and not its form or designation.

Appellee does not challenge the cases cited on page 3 of our jurisdictional statement which hold that denial of a writ of prohibition by a state court of last resort constitutes a final judgment within the meaning of Title 28, U.S. Code, Sec. 1257 (2).

In the case of *Mt. Vernon-Woodberry Cotton Duck Co. vs. Alabama Interstate Power Co.*, 240 U.S. 30, 36 Sup. Ct. 234, 60 L.Ed. 507, at page 510, this Honorable Court, speaking through Mr. Justice Holmes, stated:

> "There is a motion to dismiss the writ of error on the ground that the present decision is not final because it does not determine the merits; but this motion must be denied. Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the judicial code, act of March 3, 1911, Chap. 231, Sec. 237, 36 Stat. at L. 1087, 1156, Comp. Stat. 1913, Sections 968, 1214, under the Statutes of Alabama and by the common law. Code of 1907, Sections 4864-4867, 4872; Weston vs. Charlston, 2 Pet. 449, 464, 465, 7 L. ed. 481, 486, 487. The fact that it does not decide the merits of the principal suit is immaterial. It is not devoted to that point, but only to the preliminary question of the jurisdiction of the Court in which that suit is brought."

To the same effect, see *Rescue Army vs. Municipal Court of the City of Los Angeles*, 331 U.S. 549, 585, 67 Sup. Ct. 1409, 91 L.ed. 1666; *Dandini Petroleum Co. vs.*

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Superior Court, 284 U.S. 8, 76 L.ed. 136, 52 Sup. Ct. 103; *Michigan Central Co. vs. Mix*, 278 U.S. 492, 49 Sup. Ct. 207, 73 L.ed. 470; *Madruga vs. Superior Court*, 346 U.S. 556, 74 Sup. Ct. 298; *Hammerstein vs. Superior Court*, 341 U.S. 491, 71 Sup. Ct. 820, 95 L.ed. 1135.

The reasoning of this Court in the above cases is equally applicable to the instant case. The action instituted by the Appellant in the Colorado Supreme Court was a separate, independent action to restrain the District Court from further proceedings.

The Colorado Supreme Court entertained Appellant's petition, issued its rule to show cause, and considered the constitutional issues raised by Appellant.

It is true that Rule 116 of the Colorado Rules of Civil Procedure provides: "Relief in the nature of prohibition will not be granted except in matters of great public importance."

The Colorado Supreme Court must necessarily have considered this case to fall within that category since it entertained Appellant's petition.

The proper application of Rule 116 is a matter of state law. Appellee could properly argue in the Colorado Supreme Court that this matter was not of public importance, and that, therefore, the petition of the Appellant should be dismissed. But Appellee is foreclosed from making such argument in this Court. The action of the Colorado Supreme Court in entertaining Appellant's petition and considering the issues raised therein constitutes a determination that this case is of great public importance within the meaning of Rule 116. This determination by the Colorado Supreme Court is binding upon this Court, since it involves only issues of state procedure.

The cases of *Swift vs. Smith*, 119 Colo. 126, 201 P. (2d) 609 and *Potashnik vs. Public Service Company*, 126 Colo. 98, 247 P. (2d) 137 which are cited on page 5 of

Appellee's Motion to Dismiss, were actions in the nature of certiorari. The property owners in those cases sought review in the Colorado Supreme Court *after* the trial court had entered an order granting temporary possession.

The decisions of the Colorado Court in those cases have no application to this case, since Appellant sought an order from the Colorado Supreme Court to prohibit the trial court from proceeding in the matter. Unlike the *Potashnik* and *Swift* cases, Appellant did not ask the Colorado Supreme Court to review or set aside any decision of the trial court.

Nor are the cases of *First National Bank of Greeley vs. Minnesota Mines, Inc.*, 109 Colo. 6, 121 P.(2d) 488 (1942); *Burlington & C. R. Co. vs. Colorado Eastern R. Co.*, 45 Colo. 222, 100 Pac. 607 (1909), in point, since they did not involve actions in the nature of prohibition.

We are not here concerned with the issue of the finality of a decision of the trial court denying a motion to dismiss. That was the issue in the cases of the *First National Bank of Greeley vs. Minnesota Mines*, supra, and *Burlington and C. R. Co. vs. Colorado Eastern R. Co.*, supra. What we are here concerned with is the finality of a decision of a state court of last resort denying a writ of prohibition.

The statement of Appellee on page 6 of its Motion to Dismiss that "the Colorado Supreme Court has merely affirmed an order overruling a motion to dismiss" is not correct. The only action taken by the Colorado Supreme Court was the discharge of its rule to show cause. At no point in the opinion or judgment of the Colorado Supreme Court does it undertake to determine the correctness of the action of the trial court in denying Appellant's Motion to Dismiss.

II.

THIS APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

In Appellee's Motion to Dismiss, it is contended that a substantial federal question is not presented as there is a valid distinction between corporate and other public utilities. The Appellee does not point out that Colorado statutes have already set up the classification of public utilities as including both individual and corporate enterprises.

The cases cited by Appellee on this point do not hold that the constitutional issue raised by this appeal does not present a substantial federal question. The cases cited by Appellee hold only that under the particular circumstances presented in those cases that there was no denial of the equal protection of the law. But, in the instant case the statute under attack does result in a denial of the equal protection of the law, since its provisions confer upon corporations the right to condemn property, but deny individuals that right. We are not concerned with a law providing for the licensing or franchising of public utilities. It was that type of statute which was considered by the Court in *Los Angeles vs. Southern California Telephone Company*, 32 Cal. 2d, 378, 196 P. (2d) 773, cited by Appellee.

If Colorado had permitted corporations to operate as public utilities, but denied such privilege to individuals, we would have the same issue which was presented in the *Southern California Telephone* case.

But Colorado has granted to individuals and corporations alike, the right to carry on business as a public utility, Sec. 3, Chap. 137, 1935 C.S.A., which provides as follows:

> "The term 'public utility,' when used in this chapter, includes every common carrier, pipe-line corporation,

> gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, person or municipality operating for the purpose of supplying the public for domestic, mechanical or public uses, and every corporation, or person now or hereafter declared by law to be affected with a public interest, and each thereof, is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the Commission and to the provisions of this chapter; * * *."

Accordingly, it can not be contended that there is any reasonable basis for distinguishing between corporations and individuals in the public utility field.

The action of the Colorado legislature in grouping toge'her corporations and individuals, and recognizing that both corporations and individuals are qualified to engage in public utilities constitutes a legislative recognition that there is no legitimate basis for distinguishing between the two classes in this field. This reasoning is further borne out by the pronouncement of the Colorado Supreme Court in *Potashnik vs. Public Service Co. of Colorado*, supra, wherein it said:

> "Statutes granting to certain types of corporations, of which the Company is one, the right to exercise the powers of eminent domain, and the charter provisions of such corporations to enable them to take advantage of this privilege, grant no power in addition to that accorded by the specific provisions of the general law covering that subject, *and are designed only to give to those particular corporations the same rights under the eminent-domain provisions as might be exercised by an individual under the same circumstances.*" (Emphasis supplied.)

Appellee contends that Appellant does not have standing to raise the issue of denial of equal protection of the law, since the Appellant is not in the class which is dis-

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criminated against. In making this contention Appellee overlooks a well-recognized exception to the general rule, as stated in 16 C.J.S. Constitutional Law, sec. 88, page 181:

> "EXCEPTIONS TO RULE. Any person affected by the application of a statute alleged to be discriminatory can, *even though not belonging to the class discriminated against*, urge its unconstitutionality when no member of the injured class is in a position to raise the question; or, although there appears to be authority to the contrary, where there is no probability of the Statute being challenged by a member of such class, or, if so challenged, it would be unnecessary for the court to decide such question. It has also been held that where the provision attacked is, as a whole, unconstitutional, a person affected by the statute may raise the question, even though he is not of the class discriminated against." (Italics supplied.)

In the notes to said section above quoted on page 181 under the heading "Reason for rule," appears the following language:

> "Where no member of a class discriminated against could ever attack the constitutionality of the discriminatory statute, the rule reserving to such persons the right to raise the constitutional question would totally prevent the exercise by the court of its function of passing upon that question, and would place it in a position where it would for all time enforce rights and obligations created by an obviously void enactment. In such case any litigant to the determination of whose claim the constitutional question is fairly relevant should be permitted to raise the constitutional question." *Quong Ham Wah Co. vs. Industrial Acc. Commission of California*, 192 P. 1021, 1024, 184 Cal. 26, 12 A.L.R. 1190, error dismissed 41 S. Ct. 373, 255 U.S. 445, 65 L.Ed. 723.

We respectfully submit to this Honorable Court that the Appellant falls within the recognized exception to the general rule.

From the factual situation involved, these points are evident: first, under the general rule, the only objectors to the constitutionality of the law could be persons engaged in business as a public utility. Second, no such objector could bring an action testing the constitutionality of the statute involved, since an individual operating a public utility seeking to condemn could not attain that end by attacking the statute. His only remedy would be legislative in nature, that is, the procurement of the passage of a proper bill by the State legislature. Third, this Appellant is having her land condemned. Therefore, she has a right that is different from any other citizen as she is the only person affected.

Finally, Appellee argues that "the manufacture and sale of electric energy is public" (page 12). But this is not the issue. Appellant attacks the validity of the Colorado Statute because it grants the power of eminent domain to public utility corporations without restriction to public uses. The fact that the statute authorizes the taking of private property for a private use is a fatal defect. A statute which is unconstitutional on its face can not be saved by judicial construction. Appellee quotes, on page 7 of its motion from the Colorado Statute in question. However, it deletes from its quotation, the very provisions, the validity of which is being challenged. The entire text of the statute is as follows (italicized portions are those which were omitted from quotation in Appellee's motion):

> "Section 52. COMPANIES THAT MAY CONDEMN REAL ESTATE, RIGHTS OF WAY, EASEMENTS OR OTHER RIGHTS. If any corporation formed for the purpose of constructing a road, ditch, reservoir, pipe line, bridge, ferry, tunnel, telegraph line, railroad line, electric line or electric plants,

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shall be unable to agree with the owner, for the purchase of any real estate *or right of way or easement or other right necessary or required for the purpose of any such corporation, for transacting its business, or for any lawful purpose connected with the operations of the company*, such corporation may acquire title to such real estate *or right of way, or easement or other right*, in the manner provided by law for the condemnation of real estate, *or right of way; and any ditch, reservoir, or pipe line company may, in the same manner, condemn and acquire the right to take and use any water not previously appropriated.*"

Obviously, even though a corporation may be engaged in the business of a public utility, many of its activities do not involve public functions. For example, a public utility may own and operate an office building. It is only for actual public uses that private property may constitutionally be condemned. Since the Colorado Statute authorizes condemnation of private property, regardless of whether the intended use be public or private, it violates the provision of the Fourteenth Amendment to the Constitution.

CONCLUSION

We have not attempted here to present an exhaustive discussion of the issues presented by this appeal. We believe it is clear that the issues raised present substantial questions arising under the Constitution of the United States. Accordingly, the motion to dismiss should be denied.

Respectfully submitted,

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HAROLD B. WILLEY, Clerk

No. 460

Supreme Court of the United States

OCTOBER TERM, 1954

FREEDA CAROLINE MILLER,
also known as FREEDA MILLER, *Appellant*,

v.

PUBLIC SERVICE COMPANY OF COLORADO, a corporation; THE DISTRICT COURT OF ADAMS COUNTY; and CHRISTIAN D. STONER, one of the judges thereof, *Appellees*,

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS AND SUPPORTING MEMORANDUM

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DECEMBER 20, 1954

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 460

FREEDA CAROLINE MILLER,
also known as FREEDA MILLER, *Appellant*,

v.

PUBLIC SERVICE COMPANY OF COLORADO, a corporation; THE DISTRICT COURT OF ADAMS COUNTY; and CHRISTIAN D. STONER, one of the judges thereof, *Appellees*,

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS AND SUPPORTING MEMORANDUM

COMES NOW the appellee, Public Service Company of Colorado, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States and moves the Court to dismiss the above case on the following grounds:

1. The appeal is not within the jurisdiction of this Court because there has been no final judgment by the

state court as is required by 28 U. S. Code, Section 1257(2); and

2. The appeal does not present a substantial federal question.

I.

THIS APPEAL IS NOT FROM A FINAL DECISION OR DECREE OF THE STATE COURT.

Appellee, Public Service Company, which is a public utility under Colorado law, instituted an eminent domain proceeding in the Colorado State District Court for the purpose of condemning certain described farm land owned by appellant Miller. The petition, filed in accord with Colorado law, stated that the said lands were necessary for the construction of a huge steam electric generating plant, and that the generating plant was necessary because of the demands of the utility's customers which include many instrumentalities of the United States government. It was prayed by the electric public utility, appellee, that the trial court set the case for hearing and trial, that compensation be determined, and that the said land be appropriated to the public use as aforesaid. The electric utility did not ask for possession pendente lite even though such is permitted by Colorado law.

The land owner, appellant Miller, filed five motions in the trial court. Included in these five motions were two motions to dismiss. A motion to dismiss performs and serves the same function under the new Colorado Rules of Civil Procedure as did the old demurrer. One of the motions to dismiss asserted that the Colorado eminent domain statute under which the appellee, Public Service Company, was proceeding was "unconstitutional."

The trial court overruled the motions to dismiss and held the act constitutional, and the land owner, Miller, immediately sought review by certiorari of this interlocutory ruling by the Colorado Supreme Court. That appellate court on review held the statute constitutional and remanded the case to the District Court "in order that the proceedings as instituted in the trial court may go forward." *Miller* v. *Public Service Co. of Colorado,* — Colo. —, 272 P. 2d 283 at 287 (1954).

It is important to note that appellant, Miller, requested the appointment of a body of commissioners to determine the necessity for the taking, and demanded a jury trial on the question of compensation to be paid for the taking. Both of these motions were confessed or granted, but before the trial court could appoint commissioners to determine necessity or before a jury could be empaneled to determine compensation, these appellate proceedings seeking fragmentary review were begun as aforesaid. It must be emphasized that the only decision made by the Colorado court thus far is the overruling of the motions to dismiss.

Appellant's right to appeal rests upon 28 U. S. Code Sec. 1257(2), and review by this Court is thereby limited to final decisions of the state courts. Clearly the Colorado court has not rendered a final judgment, and this appeal must, therefore, be dismissed. This Court held in *Catlin* v. *United States,* 324 U. S. 229, that orders entered in condemnation proceedings were not appealable prior to a determination of compensation. On page 233 Justice Rutledge in rendering the opinion of the Court said:

> "....ordinarily in condemnation proceedings appellate review may be had only upon an order

> or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here. The rule applies to review by this Court of judgments of state courts, in advance of determination of just compensation, although by local statute 'judgments of condemnation', i.e., of the right to condemn particular property, are reviewable before compensation is found and awarded."

The case of *Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, is a precedent exactly in point. That was an eminent domain case which arose under the Washington statutes, which provided that there should be first a hearing on necessity and then a hearing on damages. After the first order was entered, but before the determination of compensation had been made, the Grays Harbor Logging Company obtained a review by the Washington Supreme Court which rejected the contention that the statute in question was unconstitutional. The appeal to this Court was dismissed for want of a final judgment. This Court held that an order for condemnation was merely interlocutory until the amount of the damages or award had been settled; and that at that later time the federal question could be raised even though the state court should treat its first case as res judicata.

Appellant in an effort to bring this matter within the purview of certain prohibition cases appealed to this Court, states contrary to fact at page 2 of the Statement as to Jurisdiction that this proceeding was instituted in Colorado to obtain a Writ of Prohibition. Colorado has effectively abolished writs of prohibition.

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Rule 106(a) of the Colorado Rules of Civil Procedure provides that writs of prohibition, as heretofore known, are abolished, and Rule 116 of the Rules provides that relief in the nature of prohibition will never be granted "except in matters of great public importance." The decision appealed from shows on its face that this case was not at that time considered to be a matter of great public importance.

In recent years the Supreme Court of Colorado has had occasion to review the interlocutory rulings of the trial court in eminent domain proceedings. It has always been careful to state that the proceeding was not prohibition, but was merely a review of the record in the nature of certiorari. *Swift* v. *Smith*, 119 Colo. 126, 201 P. 2d 609 (1948); *Potashnik* v. *Public Service Co.*, 126 Colo. 98, 247 P. 2d 137 (1952).*

Under Colorado law there is an unbroken line of authority that the denial of a motion to dismiss in an eminent domain proceeding such as is involved in this case is interlocutory and quite definitely not final. *First National Bank of Greeley* v. *Minnesota Mines, Inc.*, 109 Colo. 6, 121 P. 2d 488 (1942); *Burlington & C. R. Co.* v. *Colorado Eastern R. Co.*, 45 Colo. 222, 100 Pac. 607 (1909). In determining the question of the finality of the state judgment here, resort to the local law may be made in order to resolve what effect the judgment has under state practice. *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U. S. 69; *Brady* v. *Terminal R. Asso.*, 302 U. S. 678, 688;

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* After the decision in the Potashnik case the legislature of the State of Colorado amended the Eminent Domain Act to provide for the condemnation of lands for electric generating stations by public service corporations. It is pursuant to the provisions of this amended act that this action was instituted in the trial court, and it is, of course, this same act which the Colorado Supreme Court held to be constitutional and valid in all respects.

Brady v. *Southern R. Co.*, 319 U. S. 777. See Boskey, *Finality of State Court Judgments under the Federal Judicial Code*, 43 Col. L. Rev. 1002, 1005 (1943).

Furthermore this Court has held repeatedly that a judgment or decree of a state court which remands the case to the trial court for further proceedings, as was done in this case, is not a final judgment and will not be reviewed by the Supreme Court of the United States. *Schlosser* v. *Hemphill*, 198 U. S. 173; *Joslin Mfg. Co.* v. *Providence*, 251 U. S. 535; *Prudential Ins. Co.* v. *Cheek*, 252 U. S. 567. The face of the judgment is the test of its finality. *Schlosser* v. *Hemphill*, 198 U. S. 173; *Louisiana Nav. Co.* v. *Oyster Commission*, 226 U. S. 99; *Carondelet Canal & Nav. Co.* v. *Louisiana*, 233 U. S. 362; *Gulf Ref. Co.* v. *United States*, 269 U. S. 125.

Here the Colorado Supreme Court has merely affirmed an order overruling a motion to dismiss. Quite obviously the finality requirements of 28 U. S. Code Sec. 1257(2) have not been complied with. *Kalb* v. *Luce*, 305 U. S. 566. This is true, of course, in eminent domain proceedings even though constitutional objections are raised. *Republic Natural Gas* v. *Oklahoma*, 334 U. S. 62; *Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251; *Dieckmann* v. *United States*, 88 F. 2d 902 (7th Cir. 1937).

II.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The questions presented by this appeal relate to Section 52, Chapter 61, 1935 Colorado Statutes Annotated, as amended. This statute is fully set forth on

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pages 3 and 4 of appellant's Statement as to Jurisdiction and is in part as follows:

> "If any corporation formed for the purpose of constructing a road, ditch, reservoir, pipe line, bridge, ferry, tunnel, telephone line, railroad line, electric line or electric plants, shall be unable to agree with the owner, for the purchase of any real estate. . . such corporation may acquire title to such real estate. . . in the manner provided by law for the condemnation of real estate. . . ."

The statute grants the right of eminent domain to certain *corporate* public utilities. It is the contention of appellant that the statute represents unconstitutional class discrimination and denies her equal protection of the law because an individual operating as a public utility is not also granted the right of eminent domain. This contention is without merit and presents no substantial federal question.

The State of Colorado in granting the power of eminent domain to certain corporate public utilities properly recognized and appreciated the many distinctions which exist between corporations and other types of business enterprises, such as perpetuity of existence, greater degree of control by the state, and greater ability to finance large projects. Such classification is not arbitrary, is based upon a reasonable and valid distinction, applies to all within the class, and is reasonable and proper.

In *Los Angeles* v. *Southern California Telephone Company*, 32 Cal. 2d 378, 196 P. 2d 773 (1948), it was contended that a state statute granting to telegraph and telephone companies the privilege to construct their lines along public roads and highways was a

violation of the Constitution because the same privilege was not extended to individuals in the same business. The Supreme Court of California upheld the right of the state to make such a distinction between corporations and individuals and at page 781 the following appears:

> " . . . . There is ample justification for treating corporations differently from individuals in granting franchises for the operation of telephone and telegraph systems, and there is a reasonable basis for the classification of corporations as the sole recipients of the grant offered in section 536. Corporations are in a better position than individuals to finance and carry on statewide projects of this nature, they are more easily regulated and supervised, and they have much greater permanency of existence and can give better assurance of uninterrupted service. It may be that one of the purposes of section 536 was to promote the establishment of statewide communication systems, and the use of corporate ownership and management may have been considered the best method of achieving that purpose."

It must be assumed that this reasoning of the Supreme Court of California represents the settled law of the land on this subject for the appeal from that decision to this Court was dismissed for "want of a substantial federal question." *County of Los Angeles* v. *Southern California Telephone Co.,* 336 U.S. 929.

The conclusive answer to the point of equal protection of the law raised by appellant appears in the case of *Dillingham* v. *McLaughlin,* 264 U. S. 370, where it was held that a failure to grant individuals the same

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privilege as is granted to corporations was not a denial of equal protection of the law, since it did not "prevent the plaintiffs from going on with their business if they will subject themselves to the supervision incident to the corporate form." 264 U. S. at 373.

It is fundamental that a state may enact laws granting or denying privileges to specific classes of persons or businesses. The only limitation on such power is that the classification be reasonable and that the law affect all within the class alike. A classification is reasonable if not arbitrarily made, and if, in fact, some valid distinction exists between the class and others. A statute will not be set aside as a denial of equal protection of the law if any state of facts reasonably may be conceived to justify it. *Metropolitan Casualty Insurance Company* v. *Brownell*, 294 U. S. 580; *New York Rapid Transit Corporation* v. *New York*, 303 U. S. 573; *Louisville Gas & Electric Company* v. *Coleman*, 277 U. S. 32; *Quaker City Cab Company* v. *Pennsylvania*, 277 U. S. 389; *Sproles* v. *Binford*, 286 U. S. 374; *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Power Manufacturing Company* v. *Saunders*, 274 U. S. 490.

The grouping of corporations in a class as opposed to individuals, partnerships or other business entities engaged in the same type of business has been upheld by this Court as a reasonable classification. *Crescent Cotton Oil Company* v. *State of Mississippi*, 257 U. S. 129. Similarly, the distinction between general corporations and cooperatives has been held to justify classification and different treatment as to each of such classes. *United States* v. *Rock Royal Cooperative*, 307 U. S. 533; *Orient Insurance Company* v. *Daggs*, 172 U. S. 557; *Asbury Hospital* v. *Cass County*, 326 U. S. 207. A classification has often been sus-

tained by this Court with respect to corporations and other business entities engaged in the banking business. *Dillingham* v. *McLaughlin*, 264 U. S. 370; *Noble State Bank* v. *Haskell*, 219 U. S. 104; *Shallenberger* v. *First State Bank*, 219 U. S. 114; *Engle* v. *O'Malley*, 219 U. S. 128. Such classification has likewise been approved with respect to companies engaged in the insurance business. *German Alliance Insurance Company* v. *Lewis*, 233 U. S. 389. The fact that a foreign corporation was not required to post a security bond before appearing and defending an action in the state court while a non-resident individual was so required was held to be a proper classification and not a denial of equal protection of the law. *Owenbey* v. *Morgan*, 256 U. S. 94.

There is no substantial federal question presented for yet another reason. In order for one successfully to attack the constitutionality of the statute on the ground that it denies equal protection of the law, the complaining party must show that he is a member of the class discriminated against and that he has suffered an injury by reason of the failure of the legislature to extend the protection of the statute to the class of which he is a member. Appellant does not allege that she has been denied the right of eminent domain. She complains of the fact that too few have the power to condemn her land rather than too many. Inasmuch as she is not a member of the class denied the right of eminent domain, she cannot have been denied equal protection of the laws. *Sprout* v. *City of South Bend*, 277 U. S. 163; *Rosenthal* v. *New York*, 226 U. S. 260; *Aluminum Company of America* v. *Ramsey*, 222 U. S. 251; *Monamotor Oil Company* v. *Johnson*, 292 U. S. 86; *Dillingham* v. *McLaughlin*, 264

U. S. 370; *Bradley* v. *Public Utilities Commission of Ohio,* 289 U. S. 92.

Appellant states in (c)2 on page 4 of her jurisdictional statement that the Colorado statute "which grants the right to corporate public utilities to condemn private property" is unconstitutional because it permits a taking for a private use by private corporations.

Public Service Company of Colorado is a public utility company under the Public Utilities Act of the laws of the State of Colorado, and is formed for the purpose of constructing electric generating plants and is engaged in that business. The Company provides electric energy for the City and County of Denver and its environs, for 131 other communities, for rural, commercial and industrial customers, and also all or part of the electric requirements of six other utilities and of certain municipally-owned electric systems. The electric requirements of the United States Atomic Energy Commission at Rocky Flats, Buckley Field Naval Air Station, Lowry Air Force Base, the Rocky Mountain Arsenal, and other establishments and facilities of the United States are served by the appellee.

It was alleged that the increasing demands for electric energy required Public Service to construct a new generating plant and that 91.53 acres of the farmlands owned by appellant Miller were necessary for the construction of the new electric plant.

These facts are to be found in the record as a part of the petition in eminent domain. (Exhibit A, Complaint for Relief under Rule 106). They were admitted by appellant's motion to dismiss. *Cook* v. *Denver,* — Colo. —, 265 P. 2d 700 (1954).

The assertion of appellant that the appropriation of her land by this public utility for use as a site for an electric generating plant is not public is so contrary to the settled law on this subject that it needs no extended argument. In the case of *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30, it was held that the manufacture and sale of electric energy is public. It was the observation of this Court that "if that purpose is not public, we should be at a loss to say what is". In *Walker* v. *Shasta Power Co.*, 160 Fed. 856, 858, 859 (9th Cir., 1908), a condemnation by a "public service company" for electric power purposes was upheld as a public use.

As recently as November 22, 1954, this Court has again adhered to the salutary principle that when the legislature has declared a use public this declaration is well nigh conclusive. Further, it was stated that this principle controls, even though state legislation is concerned and that it admits of no exception merely because the power of eminent domain is involved. *Berman* v. *Parker*, — U. S. —, 23 U. S. Law Week 4012 (No. 22, Oct. Term 1954).

In Colorado there has been no doubt for over fifty years that the manufacture of electric energy is public. *Lamborn* v. *Bell*, 18 Colo. 346, 32 Pac. 989 (1893); *Public Service Co.* v. *Loveland*, 79 Colo. 216, 245 Pac. 158 (1926). The very decision of the Colorado Supreme Court herein appealed from states in the next to the last paragraph thereof (*Miller* v. *Public Service Co. of Colorado*, — Colo. —, 272 P. 2d 283, 287):

> " . . . In fact, the use of the property here contemplated, cannot be said to be other than a pub-

lic use since the operation of the plant in the furtherance of the conduct of the utility business is for service to the public, and is a business conducted for a public purpose. . . . "

CONCLUSION

Wherefore, appellee Public Service Company of Colorado respectfully submits that the appeal should be dismissed because the decision of the state court below is not a final decision and because the issue presented does not raise a substantial federal question.

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DECEMBER 20, 1954

No. 460. MILLER *v.* PUBLIC SERVICE CO. OF COLORADO ET AL. Appeal from the Supreme Court of Colorado. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Harry A. Feder* for appellant. *William A. Bryans, III,* and *Gerhard A. Gesell* for the Public Service Co., appellee. Reported below: 129 Colo. 513, 272 P. 2d 283.